Petition

81-458

No. ——

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Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL BANK OF COMMERCE OF SAN ANTONIO,
Petitioner,

vs.

SECRETARY OF LABOR

and

SECRETARY OF THE TREASURY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. BURLESON SMITH
TERRY S. BICKERTON*
WILLIAM H. LEMONS, III
COX & SMITH INCORPORATED
600 National Bank of Commerce Bldg.
San Antonio, Texas 78205
(512) 226-7000

Attorneys for Petitioner

**Counsel of Record*

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QUESTIONS PRESENTED FOR REVIEW

The underlying issue in this declaratory judgment action is whether the Government can compel a government contractor to comply with the preferential treatment requirements of Executive Order 11246 and its regulations, in the absence of any evidence that the government contractor has ever engaged in any discriminatory employment practices. While this action was pending in the District Court, the Government issued an Administrative Complaint against the Petitioner alleging that the Bank was in violation of the same regulations that were in issue before the Court. Specified sanctions were sought against the Bank which included loss of Government funds amounting to "over $139 million", or in excess of 25% of the Bank's total deposits. In fact, the funds in question amounted to approximately $1.5 million (3/10 of 1% of total deposits). Evidence adduced at the hearing on the Petitioner's request for a preliminary injuction established that the Government's untrue news release precipitated depositor panic which resulted in a near run on the Bank.

The District Court issued an order (1) retaining jurisdiction, (2) enjoining the imposition of sanctions and (3) invoking the doctrine of primary jurisdiction by permitting the administrative procedures to continue for the purpose of developing the "evidence, legal arguments and agency position" concerning the regulations "validity [and their] specific application in the present case," prior to a final decision of the District Court.

The United States Court of Appeals for the Fifth Circuit vacated the Trial Court's order, holding that

"a court *must* dismiss an action when it stays its hand pending administrative consideration," absent irreparable injury. The Court of Appeals further found that the injunctive relief granted by the Trial Court prevented no irreparable injury to the Bank and was improperly granted.

The questions presented for review are:

1. Whether the Court below properly held that the Trial Court was required to dismiss an action when it applied the doctrine of primary jurisdiction and stayed its hand pending preliminary administrative consideration.

2. Whether the Court below applied the proper standard of appellate review in finding no irreparable injury to support the preliminary injunction granted by the Trial Court.

LIST OF ALL PARTIES

Petitioner is National Bank of Commerce of San Antonio, a national banking association owned by National Bancshares Corporation of Texas, a Texas corporation.

Respondents are the Secretaries of Labor and Treasury.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals for the Fifth Circuit, dated October 22, 1980, is reported at 628 F.2d 474 (5th Cir. 1980), and is reproduced in the Appendix at page 1a. The Order of the United States District Court for the Western District of Texas, San Antonio Division, entered August 10, 1977, from which appeal was taken, is reproduced in the Appendix at page 18a.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 22, 1980 (Appendix, at 22a). A Petition for Rehearing and Petition for Rehearing En Banc was timely filed and the same was denied on June 8, 1981 (Appendix, at 23a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner (the "Bank") is a government contractor subject to Executive Order 11246. In September, 1976, the Department of the Treasury ("Treasury") notified the Bank that it had been selected for a compliance evaluation pursuant to Executive Order 11246 and applicable rules and regulations. In November, 1976 Treasury issued a show cause letter advising the Bank, in essence, that its affirmative action program was deficient because it failed to contain goals and timetables and other elements for the preferential employment and promotion of minorities and females.

On December 17, 1976, the Bank filed an action for declaratory judgment against the Secretary of Labor ("Labor") and Secretary of the Treasury asking the District Court to declare, in essence, whether specified affirmative action requirements of Executive Order 11246, and rules and regulations promulgated thereunder, are in conflict with Title VII of the Civil Rights Act of 1964, *as amended* (Title VII) and/or 42 U.S.C. § 1981, and further, whether attempted enforcement of the Executive Order and regulations by Labor and Treasury (hereinafter collectively the "Government") violates the Constitution. Jurisdiction in the District Court was invoked

pursuant to 28 U.S.C. § 2201, et seq., 5 U.S.C. § 701, et seq., and 28 U.S.C. §§ 1331, 1343 and 1361.

On January 20, 1977, the Government filed a motion to dismiss, alleging, in essence, that the case should be dismissed because the Bank had failed to exhaust its administrative remedies. The parties filed extensive briefs with the District Court on this issue.

On or about May 31, 1977, while the declaratory judgment action was pending in the District Court, Treasury served an Administrative Complaint on the Bank alleging that the Bank was in violation of *the same regulations* that were in question before the District Court. In the Administrative Complaint, Treasury requested an injunction prohibiting the Bank from violating the regulations in issue, and sought specified sanctions against the bank, including loss of government funds on deposit.

On June 7, 1977, the Bank filed its motion for Temporary Restraining Order and Preliminary Injunction.

At the time that the Government issued its Administrative Complaint, it also issued a contemporaneous news release which declared that the Bank stood to lose Government funds amounting to "over $139 million". At the time this was done, the Bank had total deposits of less than $500 million. In fact, the average daily balance of Government funds in the Bank which were subject to loss was approximately $1.5 million. At the hearing on the preliminary injunction the Bank put on substantial evidence that the Government's misleading publicity that the Bank was about to lose in excess of 25% of its deposits (as opposed to 3/10 of 1%) precipitated depositor panic which came

close to starting a run on the Bank. These depositors were concerned about getting their money out of the Bank before the Government withdrew its funds.[1] The Government's only witness, Kenneth Patton, Regional Manager for Treasury, Office of Equal Opportunity, admitted that this false information could have a detrimental effect on the Bank. The Government introduced *no evidence* to rebut this conclusion. Based on this evidence as well as the entire record the District Court found that the Bank would suffer irreparable injury if the imposition of sanctions (and the threat thereof) were not temporarily enjoined.

On June 18, 1977, after a hearing in which all parties were present, the District Court entered its Order Granting Preliminary Injunction (Appendix, at 13a). Pursuant to this Order the Government was restrained and enjoined temporarily and during the pendency of this action from 1) proceeding with the Administrative Complaint; 2) instituting any enforcement proceedings against the Bank under Executive Order 11246 and regulations promulgated thereunder; and 3) imposing any sanctions against the Bank.

On August 10, 1977 the District Court entered its Order Adopting Magistrate's Report as Modified; Denying Defendants' Motion to Dismiss; Denying Plaintiff's Motion for Summary Judgment; and Dissolving Preliminary Injunction in Part (Appendix, at 18a). In its Order, the District Court expressly overruled the Government's exhaustion of administrative remedies contention and concluded that it had

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[1] At the hearing on the preliminary injunction, evidence was introduced concerning two highly publicized recent bank failures in the South Texas area.

jurisdiction of the case because of the constitutional and statutory issues involved. The Court further found that there was a need for a preliminary injunction because of the Government's acts and conduct. The District Court, however, *sua sponte* invoked the doctrine of primary jurisdiction by permitting the administrative procedures to continue for the purpose of developing the "evidence, legal arguments and agency position" concerning the regulations' "validity" and their "specific application in the present case," prior to a final decision of the District Court.

On October 7, 1977, the Government filed its Notice of Appeal.

On October 22, 1980, the Circuit Court issued its Opinion and Order vacating the District Court's Order (Appendix, at 1a). This decision held that in the absence of irreparable injury to the Plaintiff "a court *must* dismiss an action when it stays its hand pending administrative consideration". 628 F.2d at 479 (emphasis in the original) On the irreparable injury issue, the Circuit Court substituted its judgment for the Trial Court's judgment and found that there was no irreparable injury. The Circuit Court concluded, therefore, that the court's jurisdiction should be relinquished and the case dismissed.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I. By failing to recognize the Trial Court's application of the primary jurisdiction doctrine the Circuit Court has decided an important federal question in a way in which conflicts with applicable decisions of this Court.

In its August 10, 1977 order the District Court, *sua sponte,* dissolved that part of the preliminary in-

junction which enjoined the Government from proceeding with the Administrative Complaint. The Circuit Court construed this action by the District Court as an application of the exhaustion of administrative remedies doctrine.

The Circuit Court's construction was erroneous. The Distict Court clearly and properly applied the primary jurisdiction doctrine.

In *United States* v. *Western Pacific Railroad Company*, 352 U.S. 59, 63-64, 57 S.Ct. 161, 165 (1956), this Court distinguished the exhaustion and primary jurisdiction doctrines as follows:

> "The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.
>
> No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation."

This distinction between the doctrines of exhaustion and primary jurisdiction compels the conclusion that the Circuit Court erred in holding that the District Court invoked the exhaustion doctrine. The District Court expressly overruled the Government's motion to dismiss based on exhaustion, concluded that the Bank's claim was originally cognizable in the court and merely suspended the judicial process pending referral to the administrative body for its views.

In *General American Tank Car Corporation* v. *El Dorado Terminal Co.*, 308 U.S. 422, 433, 60 S.Ct. 325, 331 (1940), the Court had before it a cause of action which required a determination of "the reasonableness and legality" of regulations and requirements of the Interstate Commerce Commission. The Court declared:

> "When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have *stayed its hand* pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. *There should not be a dismissal,* but, as in Mitchell Coal & Coke Co. v. Pennsylvania R.R. Co., supra, the cause should be held pending the conclusion of an appropriate administrative proceeding." (emphasis added)

See, also, *Thompson* v. *Texas Mexican Ry. Co.*, 328 U.S. 134, 151, 66 S.Ct. 937, 947 (1946) ("The judgment will be reversed and the cause remanded so that the case may be held pending the conclusion of appropriate administrative proceedings.")

This Court has long recognized the importance of maintaining a proper relationship between the courts and administrative agencies in matters affecting pub-

lic policy. See, for example, *United States* v. *Western Pacific Railroad Company, supra.* The primary jurisdiction doctrine is a critically important tool in the maintenance of this relationship. The Circuit Court's opinion has blunted this tool. By granting this petition, the Court can reaffirm and clarify the concept for the benefit of the courts and parties in future litigation.

II. The Circuit Court's reversal of the District Court's finding of irreparable injury constitutes a substitution of its judgment for that of the Trial Court, and is such a departure from the accepted and usual course of appellate review as to call for the exercise of this Court's power of supervision.

The District Court specifically found that the erroneous press release which accompanied issuance of the Administrative Complaint "irreparably injured, and will continue to irreparably injure, [the Bank's] employment, customer and business relationships." The Trial Court heard clear and convincing evidence, which was unrebutted by the Government, that the Government's misleading threat to withdraw over 25% of the Bank's cash deposits would continue to be a serious concern to depositors of the bank unless the threat of such action was enjoined.

While the Circuit Court's decision observes that "the injunction in this case prevents no future injury to the Bank [and] serves no apparent useful purpose . . ." the only evidence in the record is to the contrary. The Circuit Court decision, therefore, does not constitute a finding that the District Court abused its discretion in granting the preliminary injunction, but rather constitutes a substitution of the Circuit Court's discretion and judgment for that of the District Court. This result clearly runs afoul of this Court's view of the role of appellate review.

The universally accepted rule on the scope of appellate review of the granting or denying of a preliminary injunction is succinctly stated by this Court in *Meccano* v. *Wanamaker,* 253 U.S. 136, 141, 40 S.Ct. 463, 465 (1919):

> "The correct general doctrine is that whether a preliminary injunction shall be awarded rests in the sound discretion of the trial court. Upon appeal, an order granting or denying such an injunction will not be disturbed, unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion."

As the court stated in *Benson Hotel Corporation* v. *Woods,* 168 F.2d 694, 696 (8th Cir. 1948), "An application for a temporary injunction is addressed to the discretion of the trial court and *not* to the discretion of the appellate court . . ." (emphasis added).

The Circuit Court's finding of no future injury to the Bank may possibly be construed as a conclusion that the Government will not repeat its misconduct. No such assurances were given by the Government at the hearing on the application for preliminary injunction. In *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 633, 73 S.Ct. 894, 897 (1953), this Court stated, "The case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' The burden is a heavy one." The Government did not even attempt to meet this burden.

The Circuit Court abused its discretion in reversing the Trial Court's granting of an injunction. This abuse of discretion calls for the exercise of this Court's power of supervision in order to protect the well established roles of trial and appellate courts.

CONCLUSION

Based on the foregoing, it is respectfully requested that this Court grant the petition for writ of certiorari, review the Opinion and Order of the United States Court of Appeals for the Fifth Circuit and reverse the same.

Respectfully submitted,

J. BURLESON SMITH
TERRY S. BICKERTON*
WILLIAM H. LEMONS, III
COX & SMITH INCORPORATED
600 National Bank of Commerce Bldg.
San Antonio, Texas 78205
(512) 226-7000

Attorneys for Petitioner

**Counsel of Record*

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Oct. 22, 1980.

No. 77-3060.

NATIONAL BANK OF COMMERCE OF SAN ANTONIO,
Plaintiff-Appellee,

v.

F. RAY MARSHALL, Secretary of Labor, and G. WILLIAM MILLER, Secretary of the Treasury,
Defendants-Appellants.

Federal contractor brought declaratory judgment action challenging certain Labor Department regulations which might require it to adopt an affirmative action program. The United States District Court for the Western District of Texas, Adrian A. Spears, J., invoking the exhaustion of administrative remedies doctrine, decided to let an ongoing administrative process run its full course before considering the merits of the case, but did retain jurisdiction over action and enjoined Labor Department from actual imposition of sanctions pending full judicial review. On government's appeal, the Court of Appeals, Tjoflat, Circuit Judge, held that since contractor should have exhausted its administrative remedies and since contractor would not suffer irreparable harm if case were dismissed, district court should have dismissed action without prejudice to contractor's rights to seek judicial review at appropriate juncture.

Vacated.

Jamie C. Boyd, U.S. Atty., San Antonio, Tex., John C. Hammock, Vincent F.O'Rourke, Jr., Atty., Walter W. Barnett, Drew S. Days, III, Asst. Atty. Gen., Civil Rights, App. Sec., Dept. of Justice, Washington, D.C., for defendants-appellants.

Terry S. Bickerton, J. Burleson Smith, San Antonio, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, TJOFLAT and REAVLEY, Circuit Judges.

TJOFLAT, Circuit Judge:

Plaintiff, a federal contractor, brought a declaratory judgment action challenging certain Labor Department regulations which might require it to adopt an affirmative action program. At the time plaintiff filed the action, an administrative review of plaintiff's compliance with the regulations was proceeding. The district court, invoking the exhaustion of administrative remedies doctrine, decided to let the administrative process run its full course before considering the merits of plaintiff's case. The court did, however, retain jurisdiction over the action and enjoined the Labor Department from actual imposition of sanctions pending a full judicial airing of the merits. The Government appeals from this order.

The sole question we must decide is whether the district court, having concluded that plaintiff should exhaust its administrative remedies, erred in retaining jurisdiction. Finding nothing in the record that suggests that the plaintiff would suffer irreparable harm if the case were dismissed, we vacate the order and dismiss without prejudice to plaintiff's right to seek judicial relief at the appropriate juncture.

I

The plaintiff in this case is the National Bank of Commerce of San Antonio (the "Bank"). To obtain certain contracts with the Department of Treasury, the Bank was required under Executive Order 11246 to agree to a policy of nondiscrimination in employment and to comply with implementing regulations promulgated by the Labor De-

partment.[1] Under these regulations, federal contractors, in-

[1] Executive Order No. 11246, 3 C.F.R. 12319 (1965), as amended by Exec. Order Nos. 11375, 32 Fed.Reg. 14303 (1967), and 11478, 34 Fed. Reg. 12985 (1969), requires that governmental contracts, except those exempted by regulation, include the following language:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the

cluding the Bank, are required to analyze the representation of women and racial and ethnic minorities among their employees and, if the analysis reveals "underutilization"

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rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of Sept. 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* That in the event the contractor becomes involved in, or is threatened with litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

of a particular group, to develop an affirmative action program that ordinarily would include numerical goals and timetables by which the contractor's progress can be gauged. A key feature of the regulations is that a contractor may be required to adopt an affirmative action program regardless of whether it is accused of discrimination actionable under such federal laws as Title VII, 42 U.S.C. §§ 2000e-2000e-16 (1976), and 42 U.S.C. § 1981 (1976).

The Department of the Treasury, the governmental body contracting with the Bank, was charged with initial responsibility for monitoring the Bank's compliance with the executive order and regulations. As part of a routine review, the Department determined that the Bank had not engaged in the required analysis of its employees. Without benefit of such analysis, the Department could not evaluate the adequacy of the Bank's affirmative action program, which was nothing more than a general policy statement against job discrimination. Thus, the Department found the Bank to be out of compliance with the executive order and, in accordance with the regulations, issued a notice giving the Bank thirty days to show cause why formal enforcement proceedings should not be commenced against it.

The purpose of this thirty-day period is to enable the parties to attempt to effect an informal resolution of the dispute. It is only if such a resolution cannot be reached that the matter is referred to the Office of Federal Contract Compliance ("OFCC") for issuance of a formal administrative complaint. The contractor, upon receipt of the complaint, has twenty days to request a hearing before an administrative law judge, who, following the hearing, can propose the imposition of sanctions, including cancellation of all existing federal contracts. The administrative law judge's decision does not, however, become final unless and until approved by the OFCC Director.

The Bank, shortly after receiving the thirty-day show cause notice, brought this action in federal district court

to have the executive order declared invalid insofar as it would require the Bank to adopt an affirmative action program with goals and timetables. Basically, the Bank's position was that it had never discriminated, and thus its adoption of an affirmative action program with goals and timetables would violate Title VII and 42 U.S.C. § 1983 (Supp. 1978). Since an executive order cannot countermand lawfully enacted statutes, the regulations were, according to the Bank, invalid. Moreover, the Bank argued that if it chose to honor the order and ignore the statutes, it would be liable in damages to its white male employees. In short, the Bank considered itself faced with a Hobson's choice.

In response to the Bank's complaint, the government moved for dismissal of the action on the ground that the Bank had not exhausted its administrative remedies. The Bank advanced two arguments against the government's motion. First, it was challenging the facial validity of the regulations, whose enactment was final agency action currently ripe for review under *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Second, exhaustion of administrative remedies was not appropriate in any event because (1) application of the exhaustion doctrine would cause the Bank great harm, while relaxation would cause the government only mild inconvenience, and (2) the issue of the regulation's lawfulness would neither be disposed of nor crystallized by the administrative process. *See Ecology Center of Louisiana, Inc. v. Coleman*, 515 F.2d 860, 866 (5th Cir.1975).

Meanwhile, the thirty-day show cause period had run, and the Department of the Treasury referred the matter to the OFCC, which issued a formal administrative complaint. A press release accompanying the complaint indicated that the proceedings might result in the Bank's loss of all federal funds deposited with it. The Bank responded to the complaint and press release by moving the district court to

enjoin the enforcement proceedings. Their continuance, the Bank argued, would cause it to suffer irreparable injury, especially in connection with allegedly damaging and misleading disclosures made in the press release.

The district court dealt with the motions before it in a series of orders. In its first order, entered on March 1, 1977, the court denied the Bank's motion for injunctive relief, and the government's motion to dismiss. Both parties petitioned for reconsideration, and on June 18, 1977, the court issued a new order that granted plaintiff's motion for a preliminary injunction against continuation of the OFCC proceedings. On August 10, 1977, however, the court reversed itself and, *sua sponte*, modified its injunction to allow the administrative process to proceed but to bar the imposition of any resulting sanctions until a full judicial hearing was held on the merits. The court explained that it wanted the administrative process to continue because "the evidence, legal arguments and agency position reasonably expected to be developed through participation of the parties in the administrative procedures will no doubt be of material benefit to the court in arriving at a correct final decision." Record at 317.

It is from the last order that the government appeals.

II

The government contends that the issue on this appeal is simple and straightforward: whether the district court, having concluded that the administrative process should proceed prior to judicial consideration of the case on the merits, erred in issuing a preliminary injunction and otherwise retaining jurisdiction. The Bank counters the government's position with the two arguments it raised below: that its challenge is to the validity of the regulations, which are themselves final agency action ripe for review under *Abbott Laboratories*, and, in any event, that several excep-

tions to the exhaustion doctrine are applicable to the facts of the case. In addition, the Bank argues that even if the exhaustion doctrine does apply, the district court did not abuse its discretion in issuing the injunction to prevent the Bank from suffering irreparable injury.

For reasons we will describe more fully below, we think the Bank's first two arguments are foreclosed by its failure to cross appeal the district court's denial of preadministrative judicial review of the merits. As to the Bank's final argument, while we agree that a district court may sometimes stay its hand, but nevertheless exercise its jurisdiction to spare a plaintiff irreparable harm, we fail to see how dismissal of this action would have caused the Bank any cognizable injury.

A

Preadministrative Judicial Review

We think the district court's order, properly construed, must be read to hold preadministrative judicial consideration of the merits of the Bank's claim improper. Since the Bank did not cross-appeal the district court's order, we must accept the court's deferral of consideration of the Bank's claims as correct. Thus, the Bank's theories about preadministrative review of agency regulations and various exceptions to the exhaustion doctrine are relevant to this appeal only if they can be used to justify a court's simultaneous deferral of consideration and retention of jurisdiction of a case during the pendency of administrative proceedings.[2] We think that they cannot.

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[2]The Bank seems to regard preenforcement review of agency regulations as an exception to the exhaustion doctrine. The concept of such preenforcement review is, however, concerned with whether and when a challenge to the facial validity of regulations is ripe, and is independent of the exhaustion doctrine. Exhaustion deals with whether a court should resolve the validity

To begin, the doctrine of exhaustion, with its panoply of exceptions, is by definition concerned with the timing of judicial resolution of a case on the merits, and not with the circumstances under which a court should accept jurisdiction but then allow a case to lie fallow on the docket while administration proceedings are continuing. We think it equally clear that the principles of ripeness allowing judicial review of agency regulations outside the context of administrative enforcement proceedings are irrelevant to whether a court should allow its jurisdiction to be invoked when it views agency enforcement proceedings as a prerequisite to consideration of the case on the merits. But since the Bank places such great reliance on *Abbott Laboratories*, we will discuss further why the ripeness doctrine articulated therein fails to support the district court's actions here.

The primary purpose in finding a regulatory challenge ripe for review prior to administrative enforcement is to spare the plaintiff the irreparable injury it might suffer if judicial consideration were deferred until after enforcement proceedings have been allowed to run their full course. As the Bank notes, *Abbott Laboratories* is the leading case on when challenges to finally promulgated agency regulations are ripe for judicial review.

In *Abbott Laboratories*, plaintiffs challenged FDA regulations that would have required pharmaceutical advertising to include the generic names of brand-name drugs. The government argued that the validity of these regulations would be ripe for review only in the context of actual enforcement proceedings. The Supreme Court, however, held

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of a particular agency action directed against a particular party before administrative proceedings have been concluded. It is difficult to tell from the complaint whether the Bank regards its case as a challenge to the facial validity of regulations or as a challenge to the regulations as the OFCC will apply them to the Bank, or some combination of the two.

that pre-enforcement judicial review of agency regulations was appropriate if the issues raised were fit for review *and* if the plaintiff would suffer hardship were review withheld. The Court found such hardship in the choice faced by the plaintiffs: incurring the substantial expense of compliance with the regulations or risking criminal and civil penalties if, after completion of enforcement proceedings, the regulations were judicially upheld. The only solution to the dilemma was to have the regulations' validity judicially affirmed or denied *prior* to enforcement proceedings. Thus, it is the timing of a court's consideration of the merits and not the bare exercise of jurisdiction that is critical.

In the case before us, the district court decided to defer its consideration but retain jurisdiction during the ongoing administrative process. We think it plain that the district court's action cannot prevent the hardships that *Abbott Laboratories* was intended to ease. If the challenged regulatory requirement is valid, the district court's decision so holding will come too late to relieve the Bank of the dilemma of choosing between the expense of compliance and the risks of noncompliance. Hence, we do not think the concept of preenforcement review of agency regulations, as articulated in *Abbott Laboratories*, can be used to justify the district court's decision to retain jurisdiction of a case that it would not decide until the conclusion of administrative proceedings.[3]

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[3] We think it warrants mention that in the only case in which a federal contractor did appeal a court's dismissal of a challenge to Executive Order No. 11246's affirmative action requirements pending completion of administrative hearings, the Tenth Circuit rejected the substantive arguments the Bank advances in this case. *St. Regis Paper Co. v. Marshall*, 591 F.2d 612 (10th Cir.), *cert. denied*, 444 U.S. 828, 100 S.Ct. 55, 62 L.Ed.2d 36 (1979).

B

Irreparable Injury

The Bank's last argument is that if *Abbott Laboratories* is inapplicable to its case, and if no exception to the exhaustion doctrine is applicable, the district court nevertheless was entitled to retain jurisdiction in order to enjoin the imposition of sanctions and spare the plaintiff irreparable injury. *See, e.g., Natural Resources Defense Council, Inc. v. Train,* 510 F.2d 692, 703 n.59 (D.C.Cir.1975).

The issue whether a court *must* dismiss an action when it stays its hand pending administrative consideration has not been addressed by this circuit. The general rule is that where the plaintiff "enter[s] the federal courthouse prematurely . . . the district court should [dismiss]." *Rhodes v. United States,* 574 F.2d 1179, 1182 (5th Cir. 1978). On consideration, we think an exception to this rule should be made when the exercise of jurisdiction and the granting of preliminary relief will prevent irreparable injury to the plaintiff. If the court's actions will not, however, prevent such injury, we think a court must dismiss the action to avoid unnecessarily entangling itself in ongoing administrative proceedings.

The court's retention of jurisdiction in this case, then, would be proper only if dismissal of the action would cause the plaintiff to suffer irreparable injury. The Bank contends that this requirement is satisfied because misleading information in the OFCC press release damaged its credibility with its customers. Without considering whether such damage would constitute a cognizable injury, we are unable to share the Bank's view that the district court's injunction (and retention of jurisdiction) can somehow eradicate an injury that the Bank alleges it has already suffered. If the Bank's position is that the OFCC's unwarranted actions require an after-the-fact reprimand by injunctive order, we are unable to agree.

In summation, the injunction in this case prevents no future injury to the Bank, serves no apparent useful purpose, and at least minimally interferes with the administrative process the district court felt should continue. Thus, it should be dissolved and jurisdiction should be relinquished. If sanctions against the Bank are ultimately determined to be necessary, the Bank can seek appropriate relief at that time, including a preliminary injunction against the imposition of sanctions.[4] Accordingly, the district court's order is VACATED.

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[4] One of the prerequisites for a preliminary injunction is a judicial determination that there is a substantial likelihood plaintiff will prevail on the merits. *Buchanan v. U.S. Postal Service*, 508 F.2d 259, 266 (5th Cir. 1977). Under our decision in *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216 (5th Cir. 1977), *reversed sub nom. United Steelworkers of America v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), which was the law in this Circuit at the time the Bank filed its complaint, there may have been a substantial likelihood that plaintiff ultimately would prevail. In light of the Supreme Court's reversal of *Weber*, however, it may no longer be true that plaintiff is likely to prevail on the merits, at least concerning its challenge to the facial validity of the government's regulations. Thus, it may be that even if the Bank would have suffered an injury that a preliminary injunction could prevent, issuance of the injunction nevertheless would have been improper.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA76CA379

NATIONAL BANK OF COMMERCE OF SAN ANTONIO, *Plaintiff*,

v.

F. RAY MARSHALL, Secretary of Labor

and

W. MICHAEL BLUMENTHAL, Secretary of the Treasury,
Defendants.

ORDER GRANTING PRELIMINARY INJUNCTION

Filed June 18, 1977

Plaintiff's verified Motion for Temporary Restraining Order and preliminary Injunction was presented to the Court on June 7, 1977. The attorney for Defendants was notified in advance in order to give Defendants an opportunity to be heard. At the hearing on the temporary restraining order, Plaintiff appeared by counsel, as did Defendants.

On June 8, 1977, the Court signed and entered its Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Issue, temporarily restraining Defendants F. Ray Marshall, Secretary of Labor, and W. Michael Blumenthal, Secretary of the Treasury, their officers, agents, servants, employees and attorneys, from: (1) proceeding with their Administrative Complaint, OFCCP No. _____, styled United States Department of the Treasury v. National Bank of Commerce of San Antonio; (2) requiring Plaintiff to answer or otherwise respond to said Administrative Complaint, and the time to answer or otherwise respond to said Administrative Com-

plaint is hereby tolled and suspended during the pendency of this Order; (3) instituting any enforcement proceedings against Plaintiff under Executive Order 11246 and regulations promulgated thereunder; and (4) imposing any sanctions against Plaintiff because of its alleged refusal to establish an affirmative action program pursuant to Executive Order 11246. The hearing on the temporary injunction was set for June 14, 1977.

When this matter was called on June 14, 1977 at the appointed time and place, Plaintiff appeared by counsel, as did Defendants. The parties announced ready and proceeded to present evidence and argument on the issues before the Court. The Court has considered the pleadings, affidavits, evidence, briefs and arguments of counsel.

This is a suit for declaratory judgment, filed on December 17, 1976, asking the Court to rule whether Executive Order 11246 and specific regulations promulgated thereunder violate Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 1981 and/or the Constitution. Defendants have filed a Motion to Dismiss alleging that (1) Plaintiff has failed to exhaust its administrative remedies and (2) no claim has been stated upon which relief can be granted. Plaintiff has filed a Motion for Summary Judgment. These matters are presently pending before the Court.

On May 31, 1977, Plaintiff received an Administrative Complaint from Defendants. The Administrative Complaint alleges that Plaintiff is in violation of the same regulations which this Court has been asked to rule upon. In their Administrative Complaint, Defendants seek cancellation of Plaintiff's government contracts and a preliminary and permanent injunction enjoining Plaintiff from failing and refusing to comply with Executive Order 11246 and the regulations in question. Plaintiff is given twenty days from receipt of the Administrative Complaint to file and answer and request a hearing before an administrative law judge.

The Court finds that Plaintiff, National Bank of Commerce of San Antonio, will suffer immediate and irreparable injury, damage and harm if Defendants, F. Ray Marshall, Secretary of Labor, and W. Michael Blumenthal, Secretary of the Treasury, are not restrained and enjoined temporarily and during the pendancy of this Action from (1) proceeding with their Administrative Complaint, OFCCP, No. ————, styled United States Department of the Treasury v. National Bank of Commerce of San Antonio; (2) requiring Plaintiff to answer or otherwise respond to said Administrative Complaint; (3) instituting any enforcement proceedings against Plaintiff under Executive Order 11246 and regulations promulgated thereunder; and (4) imposing any sanctions against Plaintiff because of its alleged refusal to establish an affirmative action program pursuant to Executive Order 11246.

The Court further finds that the Administrative Complaint filed by Defendants and the press release issued by them have resulted in extensive adverse publicity for Plaintiff. The adverse publicity resulting from Defendants' actions has irreparably injured, and will continue to irreparably injure, Plaintiff's employment, customer and business relationships. Plaintiff will also be irreparably injured if Defendants are not enjoined from proceeding with their Administrative Complaint, because the practical effect of the Administrative Complaint is to bypass this Court's jurisdiction to determine the issue in controversy, the validity of the regulations in question.

The Plaintiff has raised questions going to the merits so serious, substantial, and difficult that the Court feels more deliberate and unfettered investigation is warranted. Furthermore, and without expressing an opinion as to how the Court will ultimately rule on the merits, the Court finds and concludes that Plaintiff has made a strong showing that it is likely to prevail on the merits.

Defendants have presented no evidence that Plaintiff is guilty of any unlawful discriminatory employment practices nor have they presented any probative evidence that any party will be harmed by the granting of this preliminary injunction. The Court therefore finds and concludes that the issuance of this preliminary injunction will not substantially harm any parties interested in these proceedings.

The Court further finds and concludes that the public interest will be served by the granting of this preliminary injunction.

It is therefore ORDERED, ADJUDGED and DECREED that Defendants F. Ray Marshall, Secretary of Labor, and W. Michael Blumenthal, Secretary of the Treasury, their officers, agents, servants, employees and attorneys are restrained and enjoined temporarily and during the pendency of this action from: (1) proceeding with their Administrative Complaint, OFCCP No. ———, styled United States Department of the Treasury v. National Bank of Commerce of San Antonio; (2) requiring Plaintiff to answer or otherwise respond to said Administrative Complaint, and the time to answer or otherwise respond to said Administrative Complaint is hereby tolled and suspended during the pendency of this Order; (3) instituting any enforcement proceedings against Plaintiff under Executive Order 11246 and regulations promulgated thereunder; and (4) imposing any sanctions against Plaintiff because of its alleged refusal to establish an affirmative action program pursuant to Executive Order 11246.

Plaintiff has filed a cashier's check in the amount of Five Thousand Dollars ($5,000.00) on the condition that it will abide by the decision which may be made in this cause, and that it will pay all sums of money and costs that may be adjudged against it if this Order Granting Preliminary Injunction is dissolved in whole or in part. The Court finds that this security is adequate to protect Defendants from

any costs and damages which they may incur as a result of this Order.

Signed and entered this 18th day of June, 1977, at 9:25 o'clock P.M.

/s/ Adrian A. Spears
Adrian A. Spears
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA76CA379

NATIONAL BANK OF COMMERCE OF SAN ANTONIO, *Plaintiff*,

v.

W. J. USERY, Secretary of Labor

and

WILLIAM E. SIMON, Secretary of The Treasury, *Defendants*.

ORDER ADOPTING MAGISTRATE'S REPORT AS MODIFIED; DENYING DEFENDANTS' MOTION TO DISMISS; DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; AND DISSOLVING PRELIMINARY INJUNCTION IN PART

On this the 10th day of August, 1977, after having fully considered the pleadings, briefs, evidence and arguments of counsel in this cause, the Court is of the opinion, and so finds, that the magistrate's report should be adopted as hereinafter modified; that defendants' motion to dismiss should be denied; that plaintiff's motion for summary judgment should be denied; and that the preliminary injunction entered by this Court on June 18, 1977 should be amended as hereinafter indicated.

On January 21, 1977, this matter was referred to a magistrate for a hearing on plaintiff's application for a preliminary injunction. After having conducted a full hearing on said application, the magistrate, on February 14, 1977, made nineteen findings of fact, and recommended that plaintiff's application for injunctive relief be denied "without prejudice to the presentation thereof to the Court after available administrative remedies are exhausted". Neither party objected to the findings or the recommendation of the magistrate within the ten days allowed; however, the de-

fendants objected to Finding of Fact No. X on March 2, 1977, to which the plaintiff responded that the objection came six days too late, but that, in any event, the finding was amply supported by substantial evidence in the record.

This Court adopts the magistrate's Findings of Fact Nos. I through XV, and Finding of Fact No. XVII.

With respect to the recommendation that injunctive relief be denied, and Findings of Fact Nos. XVI, XVIII and XIX, this Court disagrees with the magistrate to the extent evidenced by the granting of a preliminary injunction on June 18, 1977.[1]

In their motion to dismiss, the defendants argue that the plaintiff must exhaust its administrative remedies before seeking a judicial review of the matters in controversy. The plaintiff, on the other hand, insists that the Executive Order involved herein, and the regulations issued thereunder, are invalid, as a consequence of which it is not required to comply with the Administrative Procedure Act, 5 U.S.C. 701, et seq., and particularly Section 704 thereof.

This Court is of the opinion that the position taken by the plaintiff has considerable merit, and could very well prevail upon a final hearing, especially since no Court has found that plaintiff has intentionally engaged or is intentionally engaging in any unlawful employment practice. Nevertheless, since the Executive Order and the regulations thereunder do not appear on their face to be illegal, great

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[1] In view of the status of this litigation as it existed on March 1, 1977, which was prior to the date that the Administraive Complaint was received by the plaintiff, and in light of the fact that no objections had been filed with respect to the magistrate's findings and recommendation, they were adopted in toto and the petition of plaintiff for a temporary injunction at that time was denied without prejudice. The present action, of course, comes after subsequent events have transpired, and the Court is being called upon to consider this matter in a different context.

care should be exercised before making a judicial determination concerning their validity until more information as to their specific application in the present case has been obtained. In this connection, the evidence, legal arguments and agency position reasonably expected to be developed through participation of the parties in the administrative procedures will no doubt be of material benefit to the Court in arriving at a correct final decision, and the plaintiff will be expected to cooperate by raising the substantial issues of law and fact involved. Since, under this order, the administrative procedures are reviewable by this Court before any sanctions can be enforced, the plaintiff will suffer no irremedial adverse consequences in following this course of action.

In view of the fact that the regulations, which in themselves constitute final agency action, are being challenged on Constitutional grounds, it would be inappropriate for this case to be dismissed. Therefore, jurisdiction will be retained pending further orders of the Court.

The preliminary injunction heretofore granted has served its purpose, in that this Court has now been afforded an opportunity to study and review in detail the complex legal issues involved, and determine the course this litigation should follow in the future. Consistent with the views hereinabove, it is ORDERED that the preliminary injunction entered on June 18, 1977 should be, and it is hereby, amended as follows:

(1) Insofar as defendants are prohibited from proceeding with their Administrative Complaint, or from requiring plaintiff to answer or otherwise respond thereto, or from instituting any enforcement proceedings against plaintiff under Executive Order 11246 and the regulations thereunder, the preliminary injunction is dissolved.

(2) To the extent that no sanctions shall be imposed by defendants, or either of them, against plaintiff be-

cause of any alleged refusal to establish an affirmative action program pursuant to Executive Order 11246, the injunction shall remain in full force and effect, subject to further orders of the Court.

(3) The time for plaintiff to answer or otherwise respond to the Administrative Complaint shall not begin to run until this date.

(4) In all other respects the terms and conditions of the preliminary injunction shall remain in full force and effect as written when the order was entered on June 18, 1977.

A hearing on plaintiff's request for declaratory judgment and permanent injunction will be held after the available administrative remedies have been exhausted pursuant to the terms of this order.

A separate judgment giving effect to the conclusions herein reached is being entered coincident herewith.

The Court reserves the right to amplify its views in a written opinion at a later date.

Dated August 10, 1977.

/s/ ADRIAN A. SPEARS
Adrian A. Spears
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 19

No. 77-3060
D.C. Docket No. CA SA-76-CA-379

NATIONAL BANK OF COMMERCE OF SAN ANTONIO,
Plaintiff-Appellee,

versus

F. RAY MARSHALL, Secretary of Labor, and G. WILLIAM MILLER, Secretary of the Treasury,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

Before WISDOM, TJOFLAT and REAVLEY, Circuit Judges.

JUDGMENT

Filed June 18, 1981

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, vacated;

It is further ordered that plaintiff-appellee pay to the defendants-appellants the costs on appeal, to be taxed by the Clerk of this Court.
October 22, 1980

A true copy
Test:
Clerk, U.S. Court of Appeals, Fifth Circuit

/s/ BETTY G MARTINEZ
Betty G. Martinez
New Orleans, Louisiana
Issued at Mandate: June 18, 1981

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 77-3060

NATIONAL BANK OF COMMERCE OF SAN ANTONIO,
Plaintiff-Appellee,

versus

F. RAY MARSHALL, Secretary of Labor, and G. WILLIAM MILLER, Secretary of the Treasury,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

ON PETTION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion 10-22-80, 5 Cir., 198—, ——— F.2d ——).

Before WISDOM, TJOFLAT and REAVLEY, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

United States Circuit Judge
/s/ GILBERT F. GANUCHEAU

Entered for the Court:

Opposition

Office-Supreme Court, U.S.
FILED
OCT 21 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-458

In the Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL BANK OF COMMERCE OF SAN ANTONIO,
PETITIONER

v.

THE SECRETARY OF LABOR AND THE
SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

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No. 81-458

NATIONAL BANK OF COMMERCE OF SAN ANTONIO,
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THE SECRETARY OF LABOR AND THE
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. a. Petitioner, a bank, is a federal contractor subject to the nondiscrimination provisions of Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965), as amended by Exec. Order No. 11375, 32 Fed. Reg. 14303 (1967), Exec. Order No. 11478, 34 Fed. Reg. 12985 (1969), and Exec. Order No. 12086, 43 Fed. Reg. 46501 (1978), and to implementing regulations promulgated by the Department of Labor (Pet. App. 2a-3a). Under the Executive Order and regulations,

a federal contractor must analyze the representation of women and racial and ethnic minorities in its workforce (see 41 C.F.R. 60-2.11(b)) and if a particular group is underutilized, the contractor must develop an affirmative action program to remedy that underutilization (Pet. App. 3a-5a). See 41 C.F.R. 60-2.12, 60-2.13.[1]

Prior to October 1978, the Department of the Treasury was the federal agency with the initial responsibility for monitoring petitioner's compliance with the Executive Order (Pet. App. 5a).[2] In September 1976, the Treasury Department undertook an evaluation of petitioner's compliance and concluded that because petitioner had not performed the required analysis of its workforce, it was impossible to determine the adequacy of petitioner's affirmative action program, which consisted solely of a general policy statement against job discrimination (*ibid.*). Accordingly, the Treasury Department notified petitioner that it was not in compliance with the Executive Order and gave petitioner 30 days to show cause why the Labor Department's Office of Federal Contract Compliance Programs ("OFCCP") should not initiate formal enforcement proceedings (*ibid.*).

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[1] The regulations define "underutilization" as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability." 41 C.F.R. 60-2.11(b). Where such underutilization exists, the contractor must implement a program with goals and timetables "attainable in terms of the contractor's analysis of its deficiencies and its entire affirmative action program." 41 C.F.R. 60-2.12(a).

[2] Exec. Order No. 12086, 43 Fed. Reg. 46501 (1978), transferred the monitoring responsibility to the Department of Labor.

b. Petitioner responded by filing this suit in the United States District Court for the Western District of Texas, seeking a declaratory judgment that the affirmative action requirements of the Executive Order violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. III) 2000e *et seq.*, and 42 U.S.C. 1981 (Pet. App. 6a).[3] Petitioner sought an injunction prohibiting the government from instituting enforcement proceedings and from imposing administrative sanctions (*id.* at 6a-7a). On January 20, 1977, the government moved to dismiss the complaint on the grounds that petitioner had failed to exhaust its administrative remedies (*id.* at 6a). The district court denied that motion on March 1, 1977 (*id.* at 7a).

In the meantime the Treasury Department referred the matter to the OFCCP, which charged petitioner in a formal complaint with noncompliance with the Executive Order (Pet. App. 6a). On June 18, 1977, the district court enjoined the OFCCP administrative proceedings (*id.* at 13a-17a). The court modified that order on August 10, 1977, permitting the administrative process to go forward but enjoining the imposition of any administrative sanctions (*id.* at 18a-21a). In its order the district court stated (*id.* at 20a):

> [T]he evidence, legal arguments and agency position reasonably expected to be developed through participation of the parties in the administrative procedures will no doubt be of

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[3] The complaint also alleged that the government's effort to enforce the Executive Order violated the Constitution, the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, and "other applicable laws" (J.A. 7). "J.A." refers to the joint appendix filed in the court of appeals in this case.

material benefit to the Court in arriving at a correct final decision, and the plaintiff will be expected to cooperate by raising the substantial issues of law and fact involved.

c. The government appealed, and on October 22, 1980, a unanimous panel of the Fifth Circuit reversed. Noting that petitioner had failed to challenge, by cross-appeal, the district court's determination that consideration of the merits of petitioner's claims should be deferred pending exhaustion of administrative remedies, the court of appeals concluded that it was required to "accept the [district] court's deferral of consideration of [petitioner's] claims as correct" (Pet. App. 8a). Given that deferral decision, the court of appeals concluded, the district court erred in retaining jurisdiction of the case while the administrative process went forward (*id.* at 8a-10a). The court of appeals also held that it was error for the district court to enjoin the imposition of administrative sanctions in the absence of any showing of irreparable injury to petitioner.[4]

2. The decision of the court of appeals in this case is correct and petitioner has presented no question warranting review by this Court.

a. In its order of August 10, 1977, the district court recognized that "the Executive Order and the

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[4] In the administrative proceedings initiated by the OFCCP, the administrative law judge, on May 3, 1978, recommended cancellation of petitioner's federal contracts and ineligibility for future contracts until petitioner complies with the Executive Order. *In the matter of United States Department of the Treasury* v. *National Bank of Commerce of San Antonio*, No. 77-OFCCP-2. The Secretary of Labor must make the final determination as to the imposition of any sanctions (see 41 C.F.R. 60-30.30), and the matter is now pending before him.

regulations thereunder do not appear on their face to be illegal" (Pet. App. 19a)—a conclusion petitioner did not contest on appeal. The district court also recognized that it could not decide the validity of the Executive Order *as applied* to petitioner until the OFCCP proceedings are completed and the government has determined that an analysis of petitioner's labor force reveals an underutilization of women or minorities warranting implementation of an affirmative action program—the requirement that petitioner claimed was in conflict with Title VII (Pet. App. 20a; J.A. 6-7). We submit that the district court did not err in concluding, in effect, that the doctrine of exhaustion of administrative remedies barred judicial resolution of petitioner's claims until a final agency order had issued in the administrative process that began with the Treasury Department's show cause order. *McKart* v. *United States*, 395 U.S. 185, 193-194 (1969); *St. Regis Paper Co.* v. *Marshall*, 591 F.2d 612 (10th Cir.), cert. denied, 444 U.S. 828 (1979). In any event, as the court of appeals observed, petitioner did not appeal the district court's decision to forgo deciding petitioner's claims before the administrative process had concluded, so the only question presented was whether the district court properly retained jurisdiction of the case. Since the essence of the exhaustion doctrine is that the administrative process must be followed through "prior to invoking an exercise of jurisdiction by the courts" (*Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 764 (1947)), dismissal of the premature complaint was obviously the proper course and the district court was properly reversed for declining to dismiss. *St. Regis Paper Co.* v. *Marshall*, *supra*.

Petitioner has evidently abandoned its contention, correctly rejected by the court of appeals (Pet. App.

9a-10a), that "principles of ripeness allowing judicial review of agency regulations outside the context of administrative enforcement proceedings" support the district court's retention of this case pending completion of the administrative process; and petitioner now seeks to justify that action by reference to the doctrine of "primary jurisdiction." That doctrine is totally inapposite. "Primary jurisdiction" is properly invoked when a claim is judicially cognizable (*e.g.*, not barred by the exhaustion doctrine or lack of ripeness) but involves an issue that is either within the special competence of an administrative agency or that could disturb uniformity in the agency's practices if improperly resolved. In such cases the court stays its hand until the agency (which is generally not a party to the case) has had an opportunity to address the issue first. See, *e.g.*, *United States* v. *Western Pacific R.R.*, 352 U.S. 59 (1956); *Thompson* v. *Texas Mexican Ry.*, 328 U.S. 134 (1946). Unlike the objective in the primary jurisdiction cases, what is required here is simply a final administrative order from the Department of Labor applying the Executive Order to petitioner so that petitioner's allegation of invalidity is a concrete claim ripe for judicial review.

b. Petitioner also contends (Pet. 8-9) that the court of appeals improperly substituted its judgment for that of the district court with respect to the existence of irreparable injury, a prerequisite to preliminary injunctive relief, rather than reviewing the district court's order under an abuse of discretion standard. The court of appeals did no such thing. It declined to decide whether damage to petitioner's credibility as a result of allegedly misleading information in the OFCCP press release—the only injury

alleged—"would constitute a cognizable injury" (Pet. App. 11a). Rather, it simply reasoned that the issuance of an injunction against administrative sanctions before the administrative proceedings had concluded was not a logical remedy for the injury alleged and "at least minimally interfere[d] with the administrative process the district court felt should continue" (*id.* at 11a-12a). Thus the court of appeals, in effect, found the district court's order unsupported, even accepting arguendo its findings with respect to injury. The court of appeals accordingly did not improperly invade the province of the district court respecting the grant of injunctive relief.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1981

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